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IN THE

Supreme Court of the United States

October Term, 1962

No. 273

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Petitioners,

—against—

ANNA HALECKI, Administratrix ad Prosequendum of the Estate of Walter Joseph Halecki, deceased, and ANNA HALECKI, Administratrix of the Estate of Walter Joseph Halecki, deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on May 1, 1962.

Facts

On or about September 22, 1951, the pilot boat "New Jersey" was turned over to Rodermond Industries, Inc. for the purpose of overhauling. The vessel was moored at

a pier in the repair yard of Rodermond Industries Inc. off the North River, Jersey City, New Jersey. The overhauling and repairs were undertaken by Rodermond Industries in accordance with an agreement with the defendant and the vessel was in the custody of Rodermond on the day in question.

Walter Joseph Halecki, the plaintiff's decedent, was an electrician employed by K & S Electrical Company, a subcontractor engaged by Rodermond Industries to do electrical work aboard the vessel. On September 29, 1951, while the pilot boat "New Jersey" was tied up at the foot of Henderson Street, Jersey City, the decedent came aboard the vessel together with a co-employee of K & S, one Donald Doidge.

According to Mr. Doidge, whose deposition was taken by the defendant, he and the decedent came aboard the ship in accordance with the instructions of George Kuntz, who was decribed as the owner of K & S Electrical Company. Specifications given to K & S Electrical Company by Rodermond Industries Inc. included cleaning the generators on the ship.

Mr. Doidge testified that the date, the time and the manner in which this work was to be done was left to his discretion and that the customary method for cleaning generators was by the use of carbon tetrachloride, and that he and Halecki were familiar with it use.

On September 28, 1951, prior to the day on which the actual work was done, Doidge and Halecki set up the equipment which was necessary to perform the work. Mr. Doidge secured air hoses and an electric blower which were attached to power lines running from the ship yards. The

air hoses, and blower were all supplied by Rodermond, and the power was supplied by shore generators owned by Rodermond. At the time this work was done the pilot boat "New Jersey" was a dead ship i.e. it did not produce its own power. None of the crew took part in assembling the equipment.

At the time the actual work was done the only representative of the defendant on or near the vessel was a watchman whose duty it was to protect the vessel against fire or trespassers. He took no part in the work.

Before the work was started on the morning of September 29, 1951, the K & S employees, under the supervision of Mr. Doidge, set up portable blowers to ventilate the engine room where they were working, and also brought gas masks with them. The blowers and gas masks were the property of K & S Electric Company. The actual cleaning of the generators was done by spraying carbon tetrachloride on the generators, from a spray gun connected to an air hose. As there was no power aboard the ship, the spray gun, the air hose, the blowers and the ship's ventilation system were operated by power from the generator on shore. An oscillating fan was also used by Doidge.

In addition to the mechanical equipment, there were two open sky lights in the engine room and two open doors leading from the engine room.

Mr. Doidge testified that the decedent did most of the actual spraying, and that he kept his gas mask on while he was engaged in this work.

The work continued uneventfully from 8:30 A. M. to 4:00 P. M., when Mr. Doidge and Mr. Halecki finished working for the day. All of the equipment and ventilation

systems had operated perfectly during the day, and there was no supervision of the work other than by Mr. Doidge. Mr. Halecki left Mr. Doidge without making any complaint other than that he had a peculiar taste in his mouth.

On October 2, 1951, Mr. Halecki was admitted to the Medical Center in Jersey City, where he expired on October 12, 1951. The hospital record stated that the cause of death was carbon tetrachloride poisoning, and also disclosed that the decedent had habitually consumed excessive amounts of alcohol.

Prior Litigation

This case was previously tried before the Honorable Edward Weinfeld in December, 1956 and January, 1957. Over the objections of the defendant, the case was submitted to the jury on the basis of both unseaworthiness and negligence, and a plaintiff's verdict in the total amount of $65,000 was returned.

On appeal to the United States Court of Appeals for the Second Circuit, the judgment was affirmed by Circuit Judges Hand and Hicks, with the dissent of Circuit Judge Lumbard, 251 F. 2d 708.

Petition for Writ of Certiorari on behalf of the defendant was filed on April 28, 1958 and was granted on June 9, 1958. The appeal was argued at the October Term, 1958, and on February 24, 1959 the judgment in favor of the plaintiff was vacated and remanded by the Supreme Court of the United States (358 U. S. 613). The 5 to 4 majority opinion was delivered by Mr. Justice Stewart and held that the decedent was not entitled to the warranty of seaworthiness. It was directed that a new trial be held to determine the sole issue of negligence.

Subsequently, in October, 1959, the case was re-tried before the Honorable Archie O. Dawson and a jury, on the sole issue of negligence and resulted in a jury verdict in favor of the defendant.

The plaintiff appealed on the basis of the Trial Judge's charge, and also because of the Court's refusal to consider the element of unseaworthiness. The appeal was argued on May 10, 1960 before Circuit Judges, Clark, Moore and Friendly, who reversed and remanded in an opinion dated July 22, 1960. This opinion, reported at 282 F. 2d 137, agreed that the trial should have been on the sole question of negligence, but held that the instructions to the jury placed too much emphasis upon the element of control.

The case was tried for the third time before the Honorable John F. X. McGohey and a jury in June of 1961 on the issue of negligence, and resulted in a jury verdict in favor of the plaintiff.

Defendants thereafter appealed to the Court of Appeals for the Second Circuit which affirmed the District Court. This opinion, written by Circuit Judge Medina, with the concurrence of Circuit Judges Smith and Hays, was dated May 1, 1962, and reported at 302 F. 2d 840.

Opinions of the Court Below

The opinion of the United States Court of Appeals for the Second Circuit (Circuit Judges Medina, Smith and Hays) is reported at 302 F. 2d 840, and is set out in the appendix of this petition (pp. 1a-7a). The judgment of the United States Court of Appeals is also set forth in the Appendix.

Jurisdiction

The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of New Jersey and the defendant a New York Corporation.

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 1, 1962.

The jurisdiction of this Court is invoked under Title 28 U. S. Code § 1254(1).

Questions Presented

1. Whether the prior opinion of the Supreme Court of the United States in this case was properly interpreted by two separate panels of the Court of Appeals for the Second Circuit.

2. Whether a shipowner, which engages an independent contractor to work aboard its vessel, has a non-delegable duty to supply a safe place to work to employees of a subcontractor.

3. Whether a shipowner has a non-delegable duty of providing a safe place to work when the work itself makes the place unsafe.

4. Whether a shipowner is responsible for the manner in which an independent contractor performs its specialized work.

Reasons for Granting the Writ

1. The prior opinion of the Supreme Court of the United States in this case has been interpreted inconsistently by the Judges of the Second Circuit.

The instant case was previously before the Supreme Court, which rejected the plaintiff's action for unseaworthiness, and returned the case for a new trial on the sole basis of negligence (358 U. S. 613). Mr. Justice Stewart stated at page 618 that "it was for the triers of fact to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner of its (carbon tetrachloride) use."

Two trials and two appeals to the United States Court of Appeals for the Second Circuit have taken place since that opinion of the Supreme Court, and there has been a considerable difference of opinion as to the proper scope of the jury's consideration.

The Second Circuit, in an opinion written by Circuit Judge Moore, reversed a judgment in favor of the defendant (282 F. 2d 187) and stated that the charge given by District Judge Dawson placed undue emphasis upon the element of control.

A subsequent trial before District Judge McGohey resulted in a verdict for the plaintiff, and the defendant's appeal was based primarily upon the contention that Judge McGohey's instructions were inconsistent with Circuit Judge Moore's interpretation of the Supreme Court's opinion in the Halecki case.

It was contended by the appellant that the instructions given to the Jury by Judge McGohey were completely inconsistent with the law of the case as set forth by Circuit Judge Moore, and that the Jury was given no opportunity to determine the issues which had been defined by both the Supreme Court and the Court of Appeals.

After rejecting the plaintiff's contention that the shipowner had an absolute duty to supply a safe vessel regardless of control or notice, Circuit Judge Moore clearly set forth the issues to be submitted to the Jury. He stated that the Jury should be permitted to determine whether the shipowner was justified in relying upon the safety measures taken by the subcontractor, or whether it should have checked the adequacy of the equipment used. The Court of Appeals' opinion at page 141 defined the Jury question as follows:

> "Nevertheless there is an area of facts for jury determination and application. Some responsibility must be assumed for the type of independent contractor retained. Where a dangerous operation is to be undertaken the law suggests that reasonable care be exercised to ascertain how the work is to be carried on. This does not mean that the ship owner must undertake the direction of the actual operation. *The jury might find that the owner had done everything possible to assure safety.* On the other hand, the owner knew the capacity of its regular engine room ventilating equipment and its adequacies or inadequacies to carry off heavy and dangerous fumes. *A jury could find that assurance by the subcontractor that its own additional portable ventilators and gas masks were sufficient to prevent injury was reasonable care* or it might equally conclude that the owner should have checked equipment brought on board at least as to capacity and location for ventilating purposes." (Italics ours)

This issue however was taken away from the jury by the instructions of Judge McGohey, who charged as a matter of law that the shipowner should have taken additional

steps to provide a safe place to work. The following portion of the charge determined as a matter of law the very issue which the Court of Appeals had relegated to the Jury:

> "The defendant didn't know how to do this work. They brought it to a shipyard. Rodermond didn't feel competent to do it so they engaged K & S, Halecki's employer. The defendant was the one that ordered this work to be done by means of the carbon tetrachloride and I charge you as a matter of law that the defendant thereafter had a duty to ascertain whether the subcontractor or Rodermond was competent to do this work and they were further charged with a duty to ascertain and take reasonable steps to be sure in so far as they could that the manner and method employed by either Rodermond or K & S was reasonably proper to keep the place in which this man had to work reasonably safe under all circumstances".

It is apparent that the jury had no opportunity to consider whether the owner was justified in accepting as sufficient the safety measures taken by the electricians or whether the owner's conduct was reasonable, as defined by the opinion of Circuit Judge Moore.

The Court of Appeals for the Second Circuit, speaking through Circuit Judge Medina, rejected the appellant's contention, and upheld the instructions given by Judge McGohey. It is respectfully submitted that this decision is clearly inconsistent with the prior opinion, handed down by a panel of the same Court in reviewing the same case.

Circuit Judge Moore in the earlier opinion, had clearly stated that it was for the Jury to determine whether the shipowner acted properly in relying upon the preventive

measures taken by the subcontractor. The same Court, by Circuit Judge Medina, stated as a matter of law that the shipowner should have made some inquiry with respect to the procedures followed by the contractor.

The instructions given by Judge McGohey and upheld by the Court of Appeals, gave the Jury no opportunity to determine the issues as previously defined by Circuit Judge Moore.

2. The United States Court of Appeals for the Second Circuit in its most recent opinion, is in conflict with this Court, and with other Circuits, and with previous decisions of its own, with respect to the shipowner's duty to supply a safe place to work.

In the most recent appeal, the defendant-appellant urged that Judge McGohey further contradicted Circuit Judge Moore's holding with respect to the owner's so called non-delegable duty to supply a safe place to work. The plaintiff-appellant in that appeal had argued that this obligation should be imposed upon the shipowner, but the Court of Appeals rejected this contention, at page 141, by stating:

> "Appellant offers a quick answer in its suggested charge that 'The defendant shipowner's absolute and non-delegable duty to supply a vessel and appliances adequate and sufficient for the work to be performed imposes liability on the defendant for such conditions regardless of any absence of control by the defendant over the vessel or appliances, and regardless of whether or not the defendant had notice of the inadequacy of the appliances.' Any such principle of law would produce the anomalous result of imposing absolute liability upon a shipowner in a negligence action despite the fact that the ship owner

was required to retain others to do the work because of its own incompetence in this specialized operation. The Supreme Court has suggested an area of possible liability but it does not include the principle contained in appellant's requested charge."

However, Judge McGohey specifically placed this obligation upon the shipowner by instructing the Jury that the defendant had a duty "toward a business invitee to provide him with a safe place to work, and that duty of the defendant could not be delegated to any one else."

This portion of the charge was in direct contradiction with Circuit Judge Moore's ruling in the same case. This opinion was rejected by a number of other decisions which established that a shipowner has no non-delegable duty to provide a safe place to work under these circumstances.

The rule was cited by the Court of Appeals for the Second Circuit in *Byars* v. *Moore McCormack Lines*, 155 F. 2d 587, in which the Court held that the obligation of furnishing a safe place to work does not apply where the work itself creates a danger. The Court stated at page 588: "The reason for these exceptions to the general rule is that it would be manifestly absurd to hold the Master to the duty of providing a safe place when the very work in which the servant is engaged makes the place unsafe."

Circuit Judge Clark reached the same conclusion in *Lyons* v. *Empressona Hondurena de Vapores*, 273 F. 2d 317 (CA-2, 1959), which also involved a suit for injuries sustained by a contractor's employee aboard a vessel in a repair yard.

Please see *Filipek* v. *Moore McCormack Lines*, 258 F. 2d 734 (CA-2 1958), cert. den. 358 U. S. 927 and *Bruszewski* v.

Isthmian Steamship Line, 163 F. 2d 720 (CA-3, 1957), cert. den. 333 U. S. 828.

This judicial difference of opinion was widened when the Second Circuit, in Circuit Judge Medina's opinion, upheld these instructions on the part of Judge McGohey.

Not only does this opinion conflict with well established law of the Second Circuit and other Circuits, but the holding was inconsistent with the decision of the Supreme Court in the case of *West* v. *United States*, 361 U. S. 118. This Court considered facts very similar to the instant case, and held that the shipowner had no non-delegable duty to furnish a safe place to work where the work itself created the danger.

3. The decision of the Court of Appeals for the Second Circuit was inconsistent with the Supreme Court, with decisions of the Second Circuit and other Circuits with respect to the shipowner's responsibility for work done by an independent contractor.

This conflict has perhaps more far reaching effect than any other aspect of the case. Most of the shoreside work performed aboard vessels is entrusted to independent contractors, and the relationship between shipowners and contractors has been a fertile field of litigation. The entire marine industry depends upon the clear establishment of the responsibilities of the shipowners and contractors who are engaged to work aboard their vessels.

After the second trial, the jury verdict in favor of the defendant was reversed by the Second Circuit, on the ground that Judge Dawson's charge placed too much emphasis upon the element of control. However, Judge Mc-

Gohey's instructions went completely to the other extreme, and omitted any consideration of control which is particularly important with reference to the work of an independent contractor.

Although it was uncontroverted that the work which allegedly injured the decedent was done by an independent contractor, the trial judge refused to give any instructions whatsoever as to the shipowner's responsibility for work done by employees of an independent contractor. As far as this jury was instructed, there was no distinction between a shipowner's liability for the actions of his own crew, and for the negligence of a contractor's employees. The charge given to this jury had the inescapable effect of holding the shipowner responsible for the negligence on the part of anyone connected with the work.

According to Circuit Judge Moore's opinion, the jury must be allowed to consider whether the shipowner should have taken additional steps to ascertain if the precautions taken by the contractor were adequate. This however, is hardly tantamount to requiring the shipowner to control or direct the work. Circuit Judge Moore specifically stated at page 141:

> "Where a dangerous operation is to be undertaken the law suggests that reasonable care be imposed to ascertain how the work is to be carried on. This does not mean that the shipowner must undertake the direction of the actual operation. . . . Had it attempted to do so, in view of its own lack of proper qualifications, this interference alone would have been considered negligence."

However, the subsequent opinion of the Second Circuit, as stated by Circuit Judge Medina, upheld the instructions

of Judge McGohey and stated that they were "generally applicable to a situation where a shipowner turns over to a subcontractor the performance of an operation inherently dangerous to human nature".

This burden placed upon the shipowner is completely inconsistent with numerous decisions of the Second Circuit and other Circuits, which unanimously held that a shipowner is not liable for the manner in which a contractor's work is perormed. *Berti* v. *Compagnie de Navegacion Cyprien, Fabre*, 213 Fed. 397. *Gallagher* v. *United States Lines*, 206 F. 2d 177.

A clear conflict was set up with the Fourth Circuit which stated that a shipowner which engages competent people to do the work in which they are specialists is not required to verify for itself the effectiveness of the specialist's maintenance of his specialized equipment. *Roper* v. *United States*, 282 F. 2d 413 (4th Cir-1960) at 416.

It does not seem possible to reconcile this decision with the following authorities:

Cullings v. *Goetz*, 256 N. Y. 287;
Lyon v. *United States of America*, 163 Fed. Supp. 206, aff'd 265 F. 2d 219 (CA-2, 1959);
Lake v. *Standard Fruit Company*, 185 F. 2d 354 (CA-2, 1950);
Amato v. *United States*, 167 Fed. Supp. 929;
McKnight v. *Patterson*, 181 F. Supp. 434.

These principles, in a form of Requests to Charge were rejected by Judge McGohey, who was upheld by the Court of Appeals for the Second Circuit.

The most important conflict exists between the decision of the Second Circuit, and the opinion of the Court in

West v. United States, 361 U. S. 118. This Court stated clearly that the shipowner, who hired an independent contractor to overhaul and protect the vessel was in no way required to protect the contractor's employee against risks that were inherent to doing that work.

The Supreme Court in the *West* opinion referred to *Halecki*, and pointed out at page 124, that the situation was dissimilar, because the shipowner had directed the use of carbon tetrachloride. However, this Court stated that this required a remand on the negligence question, which clearly directed that the Jury was to determine whether the shipowner's actions were proper.

As has been pointed out, the District Judge and the Court of Appeals sought to establish the shipowner's liability as a matter of law, and did not permit the Jury to determine the extent of the defendant's obligation.

Circuit Judge Medina held that the line of cases cited above does not apply "where the shipowner required the work to be done is inherently dangerous to human safety. In such cases the shipowner is required by law to take reasonable precautions to prevent injury to the employees of subcontractors engaged to do the work."

The appellant respectfully contends that the Court of Appeals has misapplied the inherently dangerous exception to the general rule concerning the responsibility of an employer of an independent contractor. This exception has regularly been applied to liability to third parties or the general public, and not to the persons actually performing the work.

That the inherently dangerous work exception to the general rule on the liability of an employer of an indepen-

dent contractor is based upon a duty to third parties or members of the public, or to those who might be innocently injured, is illustrated in *Fegles Construction Co.* v. *McLaughlin Construction Co.*, 205 F. 2d 637 (9th Cir. 1953), cited and quoted by appellant on pages 29 and 30 of her brief. The plaintiff's property was damaged by the defendant's independent contractor permitting hot rivets to fall upon it. The hot rivets fell many times prior to the casualty and the defendant was advised of the dangerous condition. The danger involved was one to third parties, to those outside the activity of the work itself; the Court applied the exception, holding that the defendant could not divest itself of a duty owed to the community at large. We do not have a like situation in the instant case. Halecki was no stranger to the work he performed; he was not unknowing of the work he performed; he most certainly could not be said to be a member of the public at large, or of the community.

None of the Maritime cases which have considered this fact situation has attempted to apply the suggested exception to the general rule that one who engages an independent contractor is not liable for the negligence of that contractor. The opposite conclusion was reached in *Filipek* v. *Moore McCormack Lines*, 258 F. 2d 734 (CA-2 1958).

This decision, which has been continually cited with approval by the Supreme Court and by this Circuit, absolved the shipowner from liability for the manner in which the work was done by an independent contractor, although that work was dangerous. This is made clear by the language of the Court at page 737:

> "Nor is there any merit to the claim that Moore McCormack Lines failed to see that the work was

conducted in a safe manner. The defendant having hired Eastern to test the booms *admittedly a hazardous task*, was under no duty to protect the plaintiff from risks inherent in such testing." (Italics ours)

CONCLUSION

A Writ of Certiorari should be granted in accordance with the prayer of this Petition.

Dated: New York, N. Y., July 19, 1962.

Respectfully submitted,

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APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 277—September Term, 1961.

(Argued March 29, 1962 Decided May 1, 1962.)

Docket No. 27216

ANNA HALECKI, Administratrix *ad Prosequendum* of the Estate of WALTER JOSEPH HALECKI, deceased, and ANNA HALECKI, Administratrix of the Estate of WALTER JOSEPH HALECKI, deceased,

Plaintiff-Appellee,

—v.—

UNITED NEW YORK and NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Defendants-Appellants.

Before:

MEDINA, SMITH and HAYS,

Circuit Judges

Appeal from a judgment of the United States District Court for the Southern District of New York, John F. X. McGohey, *Judge*.

Appendix—Opinion

Defendants appeal from a judgment entered on a jury verdict in an action for wrongful death alleged to have been sustained through the negligence of defendants. Affirmed.

BERNARD CHAZEN, Hoboken, New Jersey (Milton Garber and Nathan Baker, Hoboken, New Jersey, on the brief), *for plaintiff-appellee.*

LAWRENCE J. MAHONEY, New York, N. Y. (Dougherty, Ryan, Mahoney & Pellegrino, New York, N. Y., on the brief), *for defendants-appellants.*

MEDINA, *Circuit Judge*:

Walter Joseph Halecki died of carbon tetrachloride poisoning contracted in the course of cleaning the generators in the engine room of the pilot boat owned by defendants-appellants. After a third trial of the case, the jury rendered a verdict of $70,000 and the shipowners again appeal. The first trial resulted in a judgment based upon both negligence and unseaworthiness. This Court affirmed (251 F. 2d 708), Chief Judge Lumbard dissenting, and the Supreme Court reversed and remanded for trial on the negligence count alone. *United Pilots Ass'n v. Halecki*, 1959, 358 U. S. 613. The second trial resulted in a verdict for defendants, and the judgment entered on this verdict was reversed by this Court and the case again remanded for a new trial (282 F. 2d 137), on the ground that the trial judge in his charge had erroneously left the jury with the impression that "liability was dependent almost en-

tirely on control" of the operation of cleaning the generators. To avoid repetition we shall assume familiarity with the facts as outlined in the prior opinions above cited.

The shipowners contend that we must again reverse because Judge McGohey is said to have departed from the controlling principles stated by the Supreme Court, and by this Court on the last appeal, and in his instructions to the jury enlarged the scope of the duty owed by the shipowners to Halecki to the prejudice of the shipowners. The gist of appellants' argument is contained in the following exception to the charge:

> "Defendant further excepts to your Honor's instruction that defendant had a duty to ascertain if Rodermond and K & S were competent and also that defendant had a duty to see that the manner and method was proper."

The evidence had disclosed that the vessel was at Rodermond's shipyard, that the shipowners had ordered Rodermond to have the generators cleaned, specifically requiring the use of carbon tetrachloride, a substance known to be dangerous to human safety, for the purpose, and Rodermond had turned the work over to K & S, Halecki's employer.

The portion of Judge McGohey's instructions to which the above-quoted exception was noted, was as follows:

> "The defendant didn't know how to do this work. They brought it to a shipyard. Rodermond didn't feel competent to do it so they engaged K & S, Halecki's employer. The defendant was the one that ordered this work to be done by means of the carbon tetra-

> chloride and I charge you as a matter of law that the defendant thereafter had a duty to ascertain whether the subcontractor or Rodermond was competent to do this work and they were further charged with a duty to ascertain and take reasonable steps to be sure in so far as they could that the manner and method employed by either Rodermond or K & S was reasonably proper to keep the place in which this man had to work reasonably safe under all the circumstances."

The main thrust of the instructions, and the context in which this portion thereof must be read, is that Halecki was a business invitee, that the shipowners owed him a duty to exercise reasonable care to furnish him with a reasonably safe place in which to work, and that the basic question was whether under all the circumstances of the case the shipowners took reasonable steps to provide a reasonably safe place in which to work.

The directions given by the Supreme Court in this case are simple and clear. "The defendants owed a duty of exercising reasonable care for the safety of the decedent." 358 U. S. at pp. 618-9. And, at p. 619: "It was for the triers of fact to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner of its [carbon tetrachloride] use."

There is no requirement in justice or common sense that the trial judge restrict his elucidation of the issues to the bare formula of the exercise of reasonable care. Carbon tetrachloride was known to be dangerous to human life when used to spray generators. The minimum precautions the shipowners could have taken were to make

some inquiry with respect to the competency of the contractor engaged to do the work, unless they already possessed reliable information on the subject, or make some inquiry with respect to the proposed method and manner of doing the work. Had the shipowners made some proper inquiry as to the competence of either Rodermond or K & S and received a reasonably satisfactory reply; or had similar proper inquiry been made and a similar response received, with respect to the proposed method and manner of doing the work, it would have been for the jury to say whether the shipowner had, under the circumstances, exercised reasonable care to provide Halecki with a reasonably safe place in which to work. What made the instructions so damaging to the shipowners, and properly so, was the fact that the evidence disclosed no efforts whatever on the part of the shipowners to ascertain whether either Rodermond or K & S were competent to do this work or to inform themselves with respect to the method and manner proposed to be followed in doing the work. For the same reason it made no difference that Judge McGohey charged the shipowners with the duty to make both such inquiries. Against such a background of fact we cannot find any error in the instructions as given.

The vessel on which Halecki was working when he sustained his injuries was at the time in the territorial waters of the State of New Jersey; the action of which the District Court had jurisdiction because of diversity was based upon the New Jersey Wrongful Death Act, N. J. Stat. Ann. 2A:31-1; and the case is governed by New Jersey law. That New Jersey has to some extent adopted maritime law has already been established. See the opinion of the Su-

preme Court in this case; 358 U. S. 613, and *The Tungus* v. *Skovgaard*, 1959, 358 U. S. 588. Moreover, the soundness of the instructions given by Judge McGohey is further attested by rulings on the same subject by American courts generally. See, e.g., *West* v. *United States*, 1959, 361 U. S. 118, 124; *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 1958, 355 U. S. 563; *Anderson* v. *Lorentzen*, 2 Cir., 1947, 160 F. 2d 173; *Vanderlinden* v. *Lorentzen*, 2 Cir., 1944, 139 F. 2d 995. In any event, Judge McGohey has done no more than apply the teaching of the Supreme Court in this very case.

Nor do we find anything to the contrary in the exposition of the measure of the shipowners' duty to Halecki in the opinion of the Court, written by our brother Moore, on the prior appeal. His comment that "the jury might find that the owner had done everything possible to assure safety," was upon the implied supposition that there was proof of "assurance by the subcontractor that its own additional portable ventilators and gas masks were sufficient to prevent injury." Even upon this hypothesis, the opinion continues and states that the jury might "equally conclude that the owner should have checked the equipment brought on board at least as to capacity and location for ventilating purposes," and thus have concluded as matter of fact that the shipowners had not exercised reasonable care to provide a reasonably safe place to work. In other words, just as charged by Judge McGohey, the question of reasonable care was one for the jury. Accordingly, we hold that the instructions as given were precisely those required by the Supreme Court and our Court in this case, and by the law generally applicable to a situation where a shipowner turns

over to a subcontractor the performance of an operation inherently dangerous to human safety.

Finally, the shipowners contend that there is no obligation on their part to provide a reasonably safe place to work "where the work itself creates a danger." It is, we think, a sufficient answer to say that the rule is to the contrary in that class of cases, such as the one now before us, where the shipowner requires the work to be done in a manner inherently dangerous to human safety. In such cases the shipowner is required by law to take reasonable precaution to prevent injury to the employees of subcontractors engaged to do the work.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit held at the United States Courthouse in the City of New York, on the first day of May one thousand nine hundred and sixty-two.

Present:

HON. HAROLD R. MEDINA,
HON. J. JOSEPH SMITH
HON. PAUL R. HAYS

Circuit Judges

ANNA HALECKI, Administratrix *ad Prosequendum* of the Estate of WALTER JOSEPH HALECKI, deceased, and ANNA HALECKI, Administratrix of the Estate of WALTER JOSEPH HALECKI, deceased,

Plaintiff-Appellee,

—v.—

UNITED NEW YORK and NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

A. Daniel Fusaro
Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 273

UNITED NEW YORK and NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Petitioners,

vs.

ANNA HALECKI, Administratrix *ad Prosequendum* of the Estate of WALTER JOSEPH HALECKI, deceased, and ANNA HALECKI, Administratrix of the Estate of WALTER JOSEPH HALECKI, deceased,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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No. 273

UNITED NEW YORK and NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Petitioners,

vs.

ANNA HALECKI, Administratrix *ad Prosequendum* of the Estate of WALTER JOSEPH HALECKI, deceased, and ANNA HALECKI, Administratrix of the Estate of WALTER JOSEPH HALECKI, deceased,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Counter-Statement of Facts

This case has been tried before a judge and jury three times in the United States District Court. It has been argued once in the United States Supreme Court, with applications for *certiorari* having been made on two occasions. The present petition is the third application to this court. The case was tried the third time on the theory of negligence against the defendant shipowner for death re-

sulting from carbon tetrachloride poisoning of the deceased, an electrician, employed by a subcontractor to clean the vessel's generators in the confined spaces of the engine room with carbon tetrachloride.

The first time the case was tried before Judge WEINFELD and a jury, the jury rendered a verdict of $67,500.00 in favor of the plaintiff. The case was submitted to the jury on the grounds of negligence and unseaworthiness. On appeal the judgment was affirmed with Chief Judge LOMBARD dissenting on the ground that the claim for unseaworthiness should not have been submitted to the jury. *Halecki* v. *United New York & New Jersey S. H. P. Ass'n*, 251 F. 2d 708 (2 Cir. 1958) (P15a). Judge LOMBARD did not dissent insofar as negligence was concerned, *Certiorari* was granted by the United States Supreme Court. *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki*, 357 U. S. 903, 78 S. Ct. 1149, 2 L. Ed. 2d 1154 (1958). A closely divided court reversed and remanded for a new trial on the issue of negligence alone. 358 U. S. 613, 79 S. Ct. 517, 5 L. Ed. 2d 372 (1959) (P3a).

This court divided only on whether the issue of unseaworthiness should have been submitted to the jury. The entire court agreed that the issue of negligence properly had been submitted to the jury.

At no point during the course of the first appeal was any attack made by any judge on the verdict of the jury in so far as the cause of action based on negligence was concerned. All judges agreed that if the verdict had been based on negligence alone, it would have stood. Judge WEINFELD in the first trial had charged in terms very similar to those charged by Judge MCGOHEY at the third trial (P1a).

Judge LEARNED HAND, whose opinion was not challenged with respect to the issue of negligence, declared that the deceased was a "business guest". He stated (P19a):

"As to the claim based on negligence, so far as the defendants mean to argue that the engine-room equipped as it was, was a reasonably safe place in which to work, we hold that the evidence created an issue that could be decided only by a verdict.—"

Judge HAND went further and stated that the defendant was under a duty "to exercise" reasonable care to ascertain the method and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities (P19a)." Mr. Justice STEWART stated (P8a):

"As to the claim based upon negligence, for which the New Jersey Wrongful Dealth Act clearly gives a right of action, *we agree with the Court of Appeals that 'the evidence created an issue that could be decided only by a verdict.'* The defendants owed a duty of exercising reasonable care for the safety of the decedent. They were charged with knowledge that carbon tetrachloride was to be used in the confined spaces of the engine room. It was for the triers of fact to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner of its use." (Italics ours)

At the second trial in the District Court, the jury brought in a verdict for the defendant. Plaintiff appealed and this court reversed on the basis of the court's charge to the jury. *Halecki v. United New York & New Jersey, etc.* 282 F. 2d 137 (2 Cir. 1960) (D3a). Judge MOORE commented (D11a):

"* * *. A careful study of the charge leaves a definite impression that the jury was told that lia-

bility was dependent almost entirely upon control. Under a less restrictive charge the same jury might well have found that the ship owner had fulfilled its 'duty of exercising reasonable care for the safety of the decedent, but the plaintiff *was entitled* to have the jury reach its conclusion upon an instruction that *emphasized the defendant's awareness of the dangerous substance to be employed and of the capacity of the ventilating equipment in the engine room* so that it could determine 'whether the defendants were responsibly negligent in permitting or authorizing the method or manner of its use.' * * *"

Following this decision, a petition for certiorari was denied. *United New York & New Jersey Sandy Hook Pilots Association* v. *Halecki*, 364 U. S. 941, 81 S. Ct. 459, 5 L. Ed. 2d 372 (1961). The case was retried a third time. This time the jury returned a verdict for $70,000.00 (D67a). The defendant appealed again from the judgment rendered.

It is important to note that the ship's crew also worked on the vessel at the time it was undergoing repairs at Rodermond. Captain Goetz, defendant's marine superintendent, testified *for the first* time at the third trial. He stated (D46a):

"Q. Were there various types of work to be done while the boat was in the repair yard? A. Yes, many types.

Q. By whom were the various types of work done? A. The shipyard.

Q. You are referring now to Rodermond? A. Yes,

Q. At the same time did the crew of the pilot boat have some work to do? A. Yes."

Walter Thompson, a witness for defendant testified that the ship's engineers were repairing the engines while the

vessel was at Rodermond (P67a). With reference to the work done on the vessel while it was at Rodermond, Mr. Doidge, a K&S employee, testified (P35a):

> "Q. Were the ship's officers there too? A. Yes.
> What were they doing. Tell me, from what you observed from Monday to Friday, what the ship's officers and crew were doing? A. Most of the work, the work involving me, was in the engine room, and the engineer and crew were down there removing heads from the diesel engines."

He also testified (P36a):

> "Q. Did you see the ship's crew doing any other work about the vessel, other than what you just described? A. I wasn't particularly interested in what they were doing. I know they were there working around me all the time.
> Q. Was the vessel in the water or on a drydock? A. In the water."

With reference to the role of the defendant's chief engineer *who has never testified*, he stated (P40a):

> "Q. Did you discuss with him the other work you had been doing prior to Saturday? A. On the specifications, yes.
> Q. What was the purpose of these discussions? A. Actually he is the boss in the engine room on the ship and any work that has to be done has got to be O.K.'d by the chief engineer and we have to consult with him all the time.
>
> • • •
>
> Q. With reference to the time, the day before when you were making these preparations, was the chief engineer present while you were making preparations on the Friday before September 29, 1951? A. Oh, yes.

Q. When was he present? A. He was present all day.

• • •

Q. Did you discuss with him the method or manner of the use of the carbon tetrachloride and the work to be done? A. No. He didn't ask and I didn't tell him what was going on.

• • •

Q. What did he say? A. He said as long as everybody was out of there, it was OK, as far as he was concerned.

Q. Did you discuss with him the method and manner in which you were going to use the carbon tetrachloride? A. No.

Q. Did he say anything about it at all? A. No.

• • •

Q. On behalf of the vessel, who was in charge of the repairs being done on that vessel during the week when you started, Monday? A. In the case of the engine room, we always went under the supervision of the chief engineer. If we are up on deck doing overhead work, then we went to the first mate or the captain."

Gerald J. Horvitz, testified as an expert, having been produced by plaintiff. He stated (P49a):

"Q. Considering the fact that this took place during the year 1951, could you tell us whether or not carbon tetrachloride was known in industry and in the business world to be a dangerous substance and that the use of it was dangerous? A. It was.

Q. Were there substitutes available in 1951? A. Yes.

Mr. Doidge testified that something other than carbon tetrachloride would have been used if it hadn't been specified by defendant (P37a). Mr. Horvitz also stated (P51a):

"Q. Considering the year of 1951 and based upon your experience that you have described with shipping and with the American Bureau of Shipping I think you said, and based upon your knowledge of the dangers of carbon tetrachloride; and the knowledge in the industry at that time, 1951, what was the usual custom and practice where carbon tetrachloride was provided to be used for the cleaning of generators at that time, in 1951?

The Court: Aboard ships, you mean?

Q. Aboard ships. A. Well, the same rule applies to carbon tetrachloride that applies to any other material giving off noxious fumes. In other words, the owner of the vessel, when he gives out his work order or contract for repairs will stipulate and state or require in that contract that a certified chemist be called in to go over and investigate and make sure that when that particular noxious material, carbon tetrachloride in this case, is used, that adequate means be taken to provide for the safety of personnel using that material.

Now, then the next thing that when those recommendations are made by the inspector, and that man of course is properly qualified and licensed by the American Bureau of Shipping, then it is the duty of the ship-owner to see that those regulations are carried out.

The Court: Mr. Horvitz, you were not asked about the duty and I will instruct the jury to disregard that expression, 'it is the duty.' You were asked what is the usual custom and practice.

The Witness: Yes. That is the practice and calls for an inspection. The next step is that proper personnel employed by the owner sees to it that those instructions are carried out and proper means made

A further point is when work is in progress, a chemist is called in to check to see whether the conditions are safe."

Mr. Horvitz, stated on cross-examination (P53a):

"Q. In your experience, Mr. Horvitz, was this work done by the shipowner or by the repair yard? A. Well, the shipowner in many cases stipulates in his contract that certain safety precautions are to be made. In many shipyards a certified chemist is employed. Maybe more than one."

Mr. Finkenaur, the expert produced by defendant, testified (P70a):

"Q. When it came to the use of carbon tetrachloride in the confines of the engine room, you do recognize that it would be necessary to have auxiliary equipment for ventilating of the vessel? A. That is correct.

Q. That was absolutely essential? A. Yes, sir.

Q. You know that? A. That is right.

Q. And the shipowner knows that or should know it?

Mr. Mahoney: Objection.

The Court: The witness testified to the need for auxiliary equipment in the ship's engine room and stated that the use was generally known in the marine trade.

The Witness: Yes, sir."

Captain Goetz conceded that even though he had been on board the vessel prior to the day the spraying was to be done he made no inquiry concerning the manner in which the work was to be done (P72a). He also confirmed the fact that he knew of the dangerous nature of the work specified by the defendant to be done in the engine room (P71a).

The plaintiff tendered the testimony of Stanley Tenusiak, a chief engineer, as an expert to establish as a matter of fact that the decedent was doing work traditionally done by seamen at the time of his death. This was the same testimony given at the second trial (P46a). The court below refused to submit the issue to a jury (P47a), and dismissed the unseaworthiness count on the ground that the rulings of this court on the second appeal controlled the District Court (D67a). Plaintiff had cross-appealed in order to preserve his right to proceed on the issue of unseaworthiness in the event there are any further proceedings. If, as plaintiff contends, the judgment below should be affirmed, this issue is moot. The defendant now seeks a writ of certiorari from the judgment of the Court of Appeals, 302 F. 2d 840 (2 Cir. 1962), which affirmed the judgment rendered on the third trial.

Counter-Questions Presented

Whether or not the defendant having directed that a dangerous chemical be used in the confined engine room of its vessel, owed to the deceased a duty to exercise reasonable care to provide him with a reasonably safe place to work?

Whether or not the duty of the defendant existed regardless of any concurrent duty owed by the shipyard or the employer of the deceased?

Whether or not the defendant had a duty to exercise reasonable care under the circumstances to ascertain the method or manner of use of a poisonous gas in the confined spaces of the engine room of its vessel where it directed that such gas be used?

Whether or not in view of the factual evidence submitted to the effect that the deceased was doing seaman's work the case should not have been submitted to the jury on unseaworthiness as well?

ARGUMENT

There is no conflict or inconsistency in the opinions of the Court of Appeals for the Second Circuit rendered after the decision of the United States Supreme Court in this case.

Judge MEDINA writing for the court in the last appeal (third appeal) in the United States Court of Appeals specifically answered petitioner's argument that the instructions of the trial judge (at the third trial) were inconsistent with the opinion of this court and with the opinion of Judge MOORE writing for the Court of Appeals after the second appeal. Judge MEDINA stated (Pet. 6a):

> *"Nor do we find anything to the contrary in the exposition of the measure of the shipowners' duty to Halecki in the opinion of the Court, written by our brother Moore, on the prior appeal.* His comment that 'the jury might find that the owner had done everything possible to assure safety,' was upon the implied supposition that there was proof of 'assurance by the subcontractor that its own additional portable ventilators and gas masks were sufficient to prevent injury.' Even upon this hypothesis, the opinion continues and states that the jury might 'equally con-

clude that the owner should have checked the equipment brought on board at least as to capacity and location for ventilating purposes,' and thus have concluded as matter of fact that the shipowners had not exercised reasonable care to provide a reasonably safe place to work. *In other words, just as charged by Judge McGohey, the question of reasonable care was one for the jury. Accordingly, we hold that the instructions as given were precisely those required by the Supreme Court and our Court in this case, and by the law generally applicable to a situation where a shipowner turns over to a subcontractor the performance of an operation inherently dangerous to human safety.*" (Italics ours.)

The alleged discrepancy or inconsistency does not exist. This case which has been reviewed and expounded upon numerous times should not be brought again before this court for a review of facts and principles of law already extensively reviewed and established. *Cf. The Wisconsin Electric Company* v. *The Dunmore Company*, 282 U. S. 813, 51 S. Ct. 214, 75 L. Ed. 728 (1931).

The trial court at the third trial very carefully charged in accordance with the opinion of this court and the opinions in the Court of Appeals (D57a). The court in its charge stated several times that the standard was that of "reasonable care" and a "reasonably prudent person"; that the duty involved a "reasonably safe place to work" and that the defendant had a duty to "take reasonable steps to be sure insofar as they could" that the manner and method employed was "reasonably safe under all the circumstances" (D58a; D59a; D60a). Among other things the court stated (D60a):

"That really is the main issue on liability in this case, as to the defendant's liability. Because *if you*

find that the defendant did not breach any duty it owed Halecki, if you find that under all of the circumstances the defendant was not negligent, *if you find that it did discharge its duty to take reasonable steps to make this place reasonably safe under the circumstances, then you must bring in a verdict for the defendant.*" (Italics ours.)

The court also specifically charged * * * "They didn't insure his safety in there." * * * (D62a). Reviewing the entire charge, the trial court fairly set forth the law applicable to this case in the light of the facts established at the trial.

See, also, *Skovgaard* v. *The M/V Tungus*, 252 F. 2d 14, 19 (3 Cir. 1957), aff'd 358 U. S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524 (1959); *Palazzolo* v. *Pan-Atlantic S.S. Corp.*, 211 F. 2d 277, 279 (2 Cir. 1954), aff'd 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956); *Guerrini* v. *United States*, 167 F. 2d 352, 355 (2 Cir. 1948); *Anderson* v. *Lorentzen*, 160 F. 2d 173, 174 (2 Cir. 1947); *Puleo* v. *H. E. Moss*, 159 F. 2d 842, 845 (2 Cir. 1947); *Vanderlin* v. *Lorentzen*, 139 F. 2d 995, 996 (2 Cir. 1947).

On the basis of the defendant's own evidence it was established that the defendant did nothing "to assure safety" and neither asked or received any assurance by the independent contractor concerning the safety measures taken for the performance of the dangerous operation ordered by the defendant in the confined spaces of its vessel. Captain Goetz, defendant's marine superintendent, testified (D41a). He had not appeared at either of the two prior trials (P71a). He stated (D43a):

"The Court: In other words, the specifications provided that the cleaning of the generators should be done by the carbon tetrachloride?

The Witness: That is right.

Q. Now which member of the Association, if any, had provided or specified that carbon tetrachloride was to be used?' A. The chief engineer.

Q. The name please? A. Carl Ebling."

On cross-examination Captain Goetz stated that the chief engineer was still alive although retired (P71a; P66a). The chief engineer, who had the most intimate knowledge of the arrangements made, if any, has never testified. Captain Goetz admitted that in 1951 he knew that carbon tetrachloride was a dangerous substance and that cleaning generators in an engine room was a dangerous operation (P71a). He testified that (P72a):

"Q. No conversation concerning ventilating equipment to use carbon tetrachloride to clean generators on the next day, Saturday? A. No, sir.

Q. You had no discussion with anybody? A. None at all.

Q. Did you make any inquiries from anyone how this work was to be done? Yes or no. A. No.

Q. Were you familiar in a general way, at that time with the use of carbon tetrachloride? A. We had used it for several years.

Q. Prior to that time? A. Prior to this time."

Captain Goetz conceded that he knew that carbon tetrachloride "was a dangerous substance" at the time the work was ordered (P71a). He also conceded that he knew that the cleaning work in the engine room was a "dangerous operation" (P71a). He did not talk to anyone about the equipment to be used (P72a). He made no inquiries concerning the methods to be used in doing the work (P72a).

The defendant in its brief and in support of its requests to charge repeats cases which have been reviewed and distinguished by Judge Moore in the second appeal in the Court of Appeals (D12a):

"* * * However, as in practically all these cases, slight factual differences call for slightly different treatment. Referring to its own decision in this case (*United Pilots Ass'n* v. *Halecki*, 358 U. S. 613 (1959)), the Court in *West* pointed out the distinguishing element here, namely, 'In that case the shipowner directed the use of carbon tetrachloride in the confined spaces of the engine room' (p. 124) * * *."

The defendant in its brief and in support of its requests to charge depends upon *Byars* v. *Moore McCormack Lines*, 155 F. 2d 587 (2 Cir. 1946); *Filipek* v. *Moore McCormack Lines*, 258 F. 2d 734 (2 Cir. 1958); *Lyons* v. *Empressa*, 273 F. 2d 317 (2 Cir. 1959); *Gallagher* v. *United States Lines Co.*, 206 F. 2d 177 (2 Cir. 1953). Each of these cases was distinguished by Judge MOORE in the second opinion of the Court of Appeals (D11a to D13a) and they were not even discussed in the third opinion of the Court of Appeals.

The defendant alleges error in the portion of the charge where the court stated that the duty the defendant owed to plaintiff "could not be delegated to any one else" (D58a). The defendant alleged that this is contrary to the ruling of Judge MOORE in the second appeal. However Judge MOORE's remarks were directed to a suggested charge of the plaintiff which was rejected by the trial court at the second trial. Judge MOORE quoted the requested charge (D9a):

"* * * 'the defendant shipowner's absolute and nondelegable duty to supply a vessel and appliances adequate and sufficient for the work to be performed imposes liability on the defendant for such conditions regardless of any absence of control by the defendant over the vessel or appliances, and regardless of whether or not the defendant had notice of the inadequacy of the appliances'. * * *"

A mere reading of the rejected charge shows that it was not in any way similar to the charge of the trial court at the third trial. The charge discussed in the above quotation speaks of an absolute and non-delegable duty imposed regardless of notice, etc. It is essentially a charge based on unseaworthiness. It makes no mention of reasonable care and a reasonably safe place to work, etc. This is entirely different from charging that the defendant couldn't delegate its own duty, which the court defined, to anyone else and that the defendant's duty continued to exist even though the shipyard or plaintiff's employer also had duties with respect to this matter (D58a). The remarks of the trial court at the third trial was fully consistent with the appellate opinions in this case and with established law.

The defendant seeks another review of this case by this court on the ground that there is an alleged inconsistency in the opinion of the Court of Appeals following the second trial and the opinion of the Court of Appeals following the third trial. The three judges of the Court of Appeals who heard the last appeal did not find any conflict between their own opinion and that of the other members of the Court who heard the second appeal. On the contrary the court found that the charge of the trial court on the third trial was in accord with the decisions of this Court and the Court of Appeals. Not only does the allegation of alleged conflict in the decisions of the Court of Appeals for the Second Circuit lack substance, but the alleged conflict with the decisions of other circuits is not established either. This case should now be permitted to come to a terminal point. If for any reason *certiorari* is granted, however, petitioner respectfully requests that this court also consider whether the issue of unseaworthiness should have been submitted to the jury in view of the factual evidence offered at the second and third trials of this action to prove that the deceased at the time of his death was doing work traditionally performed by seamen.

CONCLUSION

The law involved in this case has been exhaustively reviewed and set forth in an opinion of this court and in three opinions of the Court of Appeals. There is no special or important reason for this court to exercise its judicial discretion to review the matter further.

For the foregoing reasons, it is respectfully urged that this petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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